

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

In re:

Case No. 01-57090

CONNOLLY NORTH AMERICA, LLC,

Chapter 7

Debtor(s).

Judge Thomas J. Tucker

**OPINION REGARDING CERTAIN PENDING MOTIONS  
(DOCKET ## 921, 923, 924)**

This case is before the Court on the following motions:

1. The motion filed by Steinberg Shapiro & Clark ("SSC") on February 22, 2010 at Docket # 921, entitled "Steinberg Shapiro & Clark's Motion for Order Finding Successor Trustee in Contempt of Court and Striking Complaint" (the "SSC Contempt Motion");
2. The motion filed by Mark H. Shapiro on February 22, 2010 at Docket # 923, entitled "Mark H. Shapiro (Predecessor Trustee's) Motion for Order Finding Successor Trustee in Contempt of Court and to Strike Complaint" (the "Shapiro Contempt Motion"); and
3. The motion filed by Bruce Comly French, Trustee, on February 23, 2010 at Docket # 924, entitled "Motion by Successor Trustee Seeking Order (1) Authorizing a Limited Amendment of This Court's Stay Orders (Dockets Nos. 886 and 917) or Alternatively (2) Granting the Successor Trustee Relief From the Stay Orders (Docket Nos. 886 and 917) to Permit the Filing of An Amended Complaint" (the "Trustee's Clarification/Amendment Motion").

The Court has reviewed each of these motions and related papers, and the papers filed in opposition to these motions (Docket ## 928, 930, 931); the Adversary Complaint that French, Trustee filed on February 18, 2010, under seal, in Adversary Proceeding No. 10-4625; the Court's Orders filed December 10, 2009 and February 10, 2010 (Docket ## 886, 917); and other parts of the record relevant to the above motions.

The Court concludes that a hearing on the motions is not necessary, and in fact would needlessly cause the parties to incur additional attorney fees. The Court will rule on the motions

without a hearing, as described in this opinion, and for reasons stated in this opinion. This opinion states the Court's findings of fact and conclusions of law relating to the motions.

The Court has subject matter jurisdiction over this case and each of the motions under 28 U.S.C. §§ 1334(b) and 157(a) and (b)(1), and Local Rule 83.50(a) (E.D. Mich.) (regarding matters referred to bankruptcy judges by the district court of this district). With respect to each of the motions discussed in this opinion, this is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and 157(b)(2)(O).

The SSC Contempt Motion and the Shapiro Contempt Motion each seek a finding that French, Trustee and his attorneys are in civil contempt, because their filing of the Adversary Complaint on February 18, 2010 in Case No. 10-4625 violated the Court's Orders of December 10, 2009 and February 10, 2010 (Docket ## 886, 917). SSC and Shapiro seek an order striking the Adversary Complaint, and ordering French, Trustee and his attorneys to pay the reasonable attorney fees incurred by SSC and Shapiro in filing their contempt motions.

Bankruptcy courts have civil contempt powers. Those powers "flow from Bankruptcy Code § 105(a) and the inherent power of a court to enforce compliance with its lawful orders." *In re Walker*, 257 B.R. 493, 496 (Bankr. N.D. Ohio 2001) (citations omitted). The United States Court of Appeals for the Sixth Circuit has held that:

In a civil contempt proceeding, the petitioner must prove by clear and convincing evidence that the respondent violated the court's prior order. A litigant may be held in contempt if his adversary shows by clear and convincing evidence that "he violate(d) a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." It is the petitioner's burden . . . to make a *prima facie* showing of a violation, and it is then the responding party's burden to prove an inability to comply.

[T]he test is not whether [respondents] made a good faith effort at compliance but whether “the defendants took all reasonable steps within their power to comply with the court’s order.” [G]ood faith is not a defense to civil contempt. Conversely, impossibility would be a defense to contempt, but the [respondent] had the burden of proving impossibility, and that burden is difficult to meet.

*Glover v. Johnson*, 138 F.3d 229, 244 (6th Cir. 1998)(citations omitted); *see also Elec. Workers Pension Trust Fund of Local Union # 58, IBEW v. Gary’s Elec. Serv. Co.*, 340 F.3d 373, 379 (6th Cir. 2003).

Upon a finding of civil contempt, the Court may order appropriate remedies, including monetary relief. Monetary sanctions for civil contempt serve “either or both of two purposes; to coerce the defendant into compliance with the court’s order, and to compensate the complainant for losses sustained.” *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303-304 (1947). As noted by the court in the *Walker* case,

In keeping with the two purposes of civil contempt, there are two kinds of civil fines that may be imposed. One kind is intended to compensate for damages caused by the contemnor’s non compliance. A fine of this kind must be based upon evidence of actual loss. The second kind of fine is “payable to the court, but the [contemnor] can avoid paying the ‘fine’ by performing the act required by the court’s order.”

257 B.R. at 498 (citations omitted).

In this case, clear and convincing evidence establishes that in filing the Adversary Complaint in Case No. 10-4625 on February 18, 2010, French, Trustee and his attorneys, Jon C. Vigano, William N. Hannay, and the law firm Schiff Hardin LLP, all violated definite and specific orders of this Court. Such orders required them to refrain from filing any complaint containing *any* of the claims asserted in the February 18, 2010 Adversary Complaint.

The “definite and specific orders” violated are the Court’s December 10, 2009 stay order (specifically, Paragraph No. 2 in that Order), and the Court’s Order filed February 10, 2010, which granted a limited, specific exception to the December 10 stay order (Docket ## 886, 917). These two orders, in combination, permitted French, Trustee to file, no later than February 18, 2010, “a Breach of Fiduciary Duty Complaint against the Former Trustee [*i.e.* Mark H. Shapiro] and the surety on the Former Trustee’s bond if warranted;” and to serve that complaint. (Docket # 917, ¶¶ 2(ii) and 2(iii)). The Trustee was prohibited by the December 10 stay order from filing any other action or claim against Mark H. Shapiro or his law firm, SSC, or any of the attorneys in that law firm. (Docket # 886 at ¶ 2).

The Adversary Complaint that French, Trustee and his attorneys filed clearly violated these orders, for at least two reasons. First, the Adversary Complaint filed was *not* a “Breach of Fiduciary Duty Complaint” as that phrase is defined in the February 10, 2010 Order. As that Order made clear in its footnote no. 1, the phrase “Breach of Fiduciary Duty Complaint” has the meaning ascribed to it in French, Trustee’s motion filed at Docket # 910. That motion, in turn, defined the phrase “Breach of Fiduciary Duty Complaint” to mean the following:

an adversary complaint asserting claims **against Mark H. Shapiro** (the “Former Trustee”) **for his breach of fiduciary duty for failing to pursue Steinberg Shapiro & Clark** (“SSC”) the Former Trustee’s law firm, for failing to investigate, and, if appropriate, pursue causes of action against the D’Apolito Entities for engaging in business practices that may have harmed the Debtor, including, but not limited to, the creation of and/or participation in a scheme by the D’Apolito Entities to fraudulently obtain approximately \$19,000,000 in payments from the Debtor (the “Breach of Fiduciary Duty Complaint”)[.]

(Docket # 910 at 2, ¶ 1 (emphasis added).)

While the Adversary Complaint filed by French, Trustee includes a claim of breach of fiduciary duty against Mark H. Shapiro and his sureties, such claim is *not* a claim that Shapiro breached his fiduciary duty for “failing to pursue Steinberg Shapiro & Clark.” No such claim is alleged anywhere in the Adversary Complaint.

A second reason why the Adversary Complaint violated the Court’s orders is that it included claims against SSC, and Mark H. Shapiro, for legal malpractice and other claims, based upon the alleged negligence of SSC and of Shapiro in acting as counsel for Shapiro, Trustee. *None* of these claims were permitted by the limited exception to the December 10, 2009 stay order that is contained in the Court’s February 10, 2010 Order. That Order did not permit the filing of *any* claims against SSC. And that order did not permit the filing of any claims against Mark H. Shapiro *other than* the specific type of breach of fiduciary duty claim described above.

Thus, the Adversary Complaint filed by French, Trustee, and his attorneys on February 18, 2010, *in its entirety*, and with respect to *every* claim asserted in that Adversary Complaint, clearly violates the Court’s December 10, 2009 and February 10, 2010 orders. Those orders, in combination, were definite and specific and clearly required French, Trustee and his attorneys to refrain from filing a complaint containing *any* of the claims that were contained in the Adversary Complaint.

It is undisputed, and there is no doubt, that French, Trustee and his attorneys had prior knowledge of the Court’s orders. Further, these parties make no argument that they were unable to comply with the Court’s orders. They clearly did *not* take “all reasonable steps within their power to comply with the [C]ourt’s orders.” *Glover*, 138 F.3d at 244. Similarly, none of these parties argues that it was impossible to comply with the Court’s orders. It obviously was not

impossible. All that French, Trustee and his attorneys had to do to comply with the Court's orders was to not file the Adversary Complaint that they in fact filed. Furthermore, if they wanted to file a complaint that *was* authorized by the limited exception to the stay order contained in Paragraph 2(ii) of the Court's February 10, 2010 Order, French, Trustee and his attorneys easily could have done so. But they did not do so, for reasons that they have failed to disclose or explain in their response to the contempt motions.

French, Trustee and his attorneys suggest in their response to the contempt motions, and in the Trustee's Clarification/Amendment Motion, that the Court's Orders were unclear in some way, and caused them reasonable uncertainty as to whether or not the Adversary Complaint they filed violated the Court's orders. Such contentions are without merit. The Court's orders were clear. There is nothing uncertain about their meaning, and no clarification of these orders is necessary.

With respect to French, Trustee's request, in the Trustee's Clarification/Amendment Motion, that the Court clarify or amend the February 10, 2010 Order, that request must be denied. The Trustee's motion offers no good reason why the Court should clarify or amend either its December 10, 2009 Order or its February 10, 2010 Order.

The filing of the Adversary Complaint was a blatant violation of the Court's orders. And it undoubtedly caused Shapiro and SSC loss, in the form of the attorney fees they incurred in reviewing the Adversary Complaint and in preparing and filing their contempt motions. Those motions were a reasonable response to the contemnors' violation of the Court's orders, and the timing of those motions also was reasonable. The contemnors must compensate Shapiro and

SSC for the reasonable attorney fees and any reasonable expenses they incurred, as part of the remedy for their contempt.

The other part of the remedy for the contempt is that the Adversary Complaint and all of its counts must be dismissed. *See, e.g., Smith v. Akron City Council*, 173 F.3d 856, Nos. 98-3389, 98-3465, 1999 WL 183409 (6th Cir. March 16, 1999)(unpublished table decision). Shapiro and SSC have asked the Court to strike this complaint. The Court concludes, however, that the appropriate remedy is to dismiss the offending complaint and all of its counts. The question then becomes whether to dismiss with prejudice, or without prejudice. The Court concludes that a dismissal of these claims with prejudice is not necessary or appropriate. A dismissal without prejudice is a sufficient remedy for the contempt, because it restores the litigation status quo *ante*.

The Court further concludes that it should give French, Trustee an opportunity to file an amended complaint that states a claim of the type permitted by the February 10, 2010 Order. The Trustee may decide not to do so, since he did not include such a claim in the Adversary Complaint he filed on February 18, 2010. But in case he wishes to do so, the Court will give him another opportunity. This is a form of lenience that the Court is not required to give, but the Court believes it should do so, because (1) French, Trustee represents the interests of the bankruptcy estate, and all its creditors; (2) allowing such an amendment opportunity does not prejudice Shapiro or SSC; and (3) the remedies the Court is ordering today will be sufficient to fully remedy the contempt.

Therefore, as appropriate and necessary remedies for the violation of the Court's Orders, the Court will order the following relief. First, the Court will enter an Order in the adversary

proceeding, dismissing all counts in the Adversary Complaint, without prejudice, but granting French, Trustee leave to file an amended complaint, under seal, that is strictly limited to a complaint and claim of the type described in Paragraph 2(ii) of the Court's February 10, 2010 Order.<sup>1</sup> Second, to compensate Mark H. Shapiro and SSC for their losses incurred because of the violation of the Court's orders, the Court will order French, Trustee and his attorneys, jointly and severally, to pay to SSC and Shapiro the reasonable attorney fees and any reasonable expenses incurred by them in filing their contempt motions.

In addition, the Court will enter an Order denying the Trustee's Clarification/Amendment Motion.

**Signed on March 19, 2010**

**/s/ Thomas J. Tucker**  
**Thomas J. Tucker**  
**United States Bankruptcy Judge**

Not for publication

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<sup>1</sup> In giving French, Trustee another chance to file a complaint that complies with the Court's orders, the Court cautions the Trustee and his counsel that if they file an amended complaint that does not comply with the Court's orders in any respect, the Court may issue further and more severe sanctions, including dismissal of the adversary proceeding and all claims asserted in it to date with prejudice, and including further monetary sanctions.